Supreme Court, U. S.
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No. 76-1113

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CORA McRAE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MEMORANDUM IN OPPOSITION TO THE MOTION TO AFFIRM OR DISMISS

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Pursuant to 28 U.S.C. 1252, this case is here on appeal from an order of the United States District Court for the Eastern District of New York, preliminarily enjoining enforcement of Section 209 of Pub. L. 94-439, 90 Stat. 1434. Characterizing the decision below as an "interlocutory determination of * * * probability of success on the merits" rather than as an "interlocutory determination of unconstitutionality," appellees contend (Mot. 4-11) that this Court lacks jurisdiction. Both appellees' premise and their legal argument are erroneous.

1. Appellees' premise that there has been no holding on the constitutional issue is unsound; the district court made an "interlocutory determination of unconstitutionality" (Mot. 6). In its opinion on rehearing, the district

court noted that in its initial opinion it had not explicitly stated "that Section 209 was unconstitutional" (J.S. App. B, p. 29a), but it hastened to repair that deficiency by acknowledging that a holding of unconstitutionality had been "implicit in the granting of the injunction" (*ibid.*).[1] Accordingly, appeal lies to this Court under 28 U.S.C. 1252, which permits such an appeal from "an interlocutory * * * judgment * * * holding an Act of Congress unconstitutional in any civil action * * * to which [the federal government] is a party."

2. But appeal would lie to this Court even if, as appellees contend, the decision below were based upon an "interlocutory determination of * * * probability of success on the merits" (Mot. 6). Where, as here, enforcement of an Act of Congress is sought to be enjoined exclusively on constitutional grounds, an interlocutory order enjoining enforcement is a holding of unconstitutionality within the meaning of 28 U.S.C. 1252.

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[1]Appellees rely upon the district court's "reference [in its initial opinion] to the fact that it was merely adjudicating the probability of ultimate success" (Mot. 8). But appellees overlook that the district court was referring to the likelihood that *this Court* would decide the issue favorably to the position taken by appellees. The district court stated (J.S. App. A, p. 19a; emphasis added):

> The cases in the District Courts and the Courts of Appeals which have invalidated efforts of certain of the states under their Title XIX plans to deny Medicaid reimbursement for elective abortions establish the probability that plaintiffs will prevail on the ultimate issue of merit. [Citations omitted.] (*The Supreme Court will determine the issue.*)

Thus the district court itself held Section 209 unconstitutional but is awaiting this Court's decisions in the pending state cases (*Beal* v. *Doe*, No. 75-554, and *Maher* v. *Roe*, No. 75-1440, both argued January 11, 1977) before proceeding to final judgment. This view is confirmed by the fact that no further proceedings have been conducted in the district court.

This Court so held in *McLucas* v. *DeChamplain*, 421 U.S. 21. In that case, the United States District Court for the District of Columbia had preliminarily enjoined a court martial proceeding under Article 134 of the Uniform Code of Military Justice, holding that "[p]laintiff has demonstrated the likelihood of his prevailing on the merits." 367 F. Supp. 1291, 1298. This Court accepted jurisdiction over the government's appeal pursuant to 28 U.S.C. 1252, stating (421 U.S. at 30):

> It might be argued that, in deciding to issue the preliminary injunction, the District Court made only an interlocutory determination of appellee's probability of success on the merits and did not finally "hold" the article unconstitutional. By its terms, however, §1252 applies to interlocutory as well as final judgments, decrees, and orders, and this Court previously has found the section properly invoked when the court below has made only an interlocutory determination of unconstitutionality, at least if, as here, that determination forms the necessary predicate to the grant or denial of preliminary equitable relief.

In other words, this Court, unlike appellees, drew no distinction between "an interlocutory determination of * * * probability of success on the merits" and "an interlocutory determination of unconstitutionality." Under *DeChamplain*, it is sufficient for this Court's jurisdiction that an Act of Congress has been attacked solely on constitutional grounds and the interlocutory judgment is against the validity of the Act.

This result is sound. The principal purpose of 28 U.S.C. 1252 is to permit the federal government to obtain expeditious review by this Court when a lower court has stopped, even if only preliminarily, the operation of a

federal statute. See *Fleming* v. *Rhodes*, 331 U.S. 100, 103-104; *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31. That purpose would be significantly frustrated if, as appellees argue, the question of jurisdiction were to be made to turn upon the degree to which the lower court's views on the underlying constitutional issue could be said to be fixed rather than tentative. Such a rule would engender case-by-case jurisdictional litigation, which, by injecting additional issues and creating confusion over which appellate court has jurisdiction, would substantially impair the ability of parties to obtain the expeditious appellate resolution that the statute was designed to provide.

Jurisdictional statutes are to be given a "practical rather than a technical construction." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546. See also *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171. Appeal therefore should lie under 28 U.S.C. 1252 without regard to whether the lower court believed a challenged statute was certainly, or only probably, unconstitutional, so long as the court acted on that belief to enjoin the statute's operation.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

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